No. 3997

2

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOFFSCHLAEGER COMPANY, LIMITED,
Plaintiff in Error,

vs.

MARGARET FRAGA, by Alfred Fraga, her guardian ad litem,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

FRED PATTERSON,
CHARLES S. DAVIS,
Honolulu, T. H.,
MORRISON, DUNNE & BROBECK,
EDWARD HOHFELD,
San Francisco, California,
Attorneys for Defendant in Error.

No. 3997

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOFFSCHLAEGER COMPANY, LIMITED,
Plaintiff in Error,

vs.

MARGARET FRAGA, by Alfred Fraga, her guardian ad litem,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Statement of Facts.

On the 20th day of August, 1920, about 3 o'clock P. M. Margaret Fraga, defendant in error, a minor aged 13 years, was injured by falling into an elevator shaft on the public sidewalk while walking along Keawe Street in Hilo, Territory of Hawaii, in front of the premises occupied by the plaintiff in error under lease (for lease see Exhibit "A", Tr. p. 408).

For convenience the parties will hereafter be referred to by their designations in the trial court,

that is to say: the defendant in error as plaintiff, and the plaintiff in error as defendant.

The evidence shows that plaintiff was walking slowly along Keawe Street, which is a business street in Hilo; she had two small packages in her hand at the time of the accident; when she was in front of the premises of defendant her attention was attracted by a call from Dan Borden, a boy who was walking along on the other side of the street (Tr. p. 167); she looked across the street to see who was calling and as she did so she stepped into an opening in the sidewalk in front of the defendant's place of business (Tr. p. 168); she had been in the habit of going along this sidewalk prior to the time of the accident, but had never before stumbled over anything or met with any accident along this sidewalk (Tr. p. 168); the opening into which she fell was an open trap-door in the sidewalk over a sidewalk elevator which was used by defendant for the purpose of receiving and discharging merchandise into, and from, the basement of its place of business, this trap-door having been negligently left open by one of its employees who, in the course of defendant's business, was intending to move some merchandise of defendant from the basement on to the sidewalk; the elevator door, when closed, is flush with the sidewalk, and consists of two doors, opening from the middle, each of these doors being about 20 inches wide and 4 feet in length. When open, each door stands at an angle of about 75° with the sidewalk. One of the exhibits

in the case (Plaintiff's Exhibit "E") is a photograph of this particular door, when open, and shows very clearly the position of the door at the time the accident took place. At the time of the accident only one of these doors was open, and that was the door farthest from the plaintiff at the time she fell in; the depth of the opening was approximately 10 feet, and at the time of the accident the elevator was at the bottom of the shaft, and the walls of the shaft were lined with heavy stones; the plaintiff was rendered unconscious by reason of the fall (Tr. p. 168).

The evidence showed that, as a result of the fall down the elevator shaft, plaintiff's left eyelid was lacerated, and that this injury left a permanent scar (Tr. p. 170); her back was strained, and at the time of the trial 9 months later her back still pained her (Tr. p. 223); her head was contused (Tr. p. 213); her arms were abraded (Tr. p. 212); her two hips were injured (Tr. p. 212); her right foot was sprained and her right leg injured (Tr. p. 212); in addition to these injuries, however, the most serious injury which she suffered was one to her left knee, consisting of a fracture, or as otherwise called, a separation of the epiphysis from the tibia or shaft of the leg (Tr. p. 246). This widening or separation of the epiphysis from the shaft of the leg is plainly shown on Plaintiff's Exhibit "B", an X-ray photograph of her injured left knee taken on September 4, 1920, two weeks after the injury. A comparison of this photograph with an X-ray photograph (Ex-

hibit "N") of her right or uninjured knee plainly showed the separation of the epiphysis in her left knee. Exhibit "K", being an X-ray photograph of her left or injured knee taken shortly before the time of the trial, while showing some lessening of the separation of the epiphysis still disclosed a wider separation than the normal condition as shown by her right or uninjured knee.

She was immediately put to bed, where she remained three weeks, during which time she suffered pain (Tr. p. 170), after which she returned to school and was taken back and forth in an automobile and was not able to walk. This condition still obtained at the time of the trial nine months later, and at the time of the trial plaintiff's knee was still swollen and a rubber support was worn about the knee; plaintiff testified that she was unable to walk comfortably and that when she walked "it seems that the bones are going back and forth" (Tr. p. 171) and that she could not "walk comfortably" (Tr. p. 171); and that the pains in her knee felt like a "grating" when she walks, and that this is painful to her; that at the time of the trial plaintiff stated that she was able to walk around the house but that she felt pains in her legs; she went to school but it was necessary for her to travel to and from school in an automobile; that she is not able to play any games which require the use of her leg; that she was still in the charge of her doctor and was going to her doctor about twice a week;

that her leg was swollen on the day of the trial and was exhibited to the jury and that it swelled up every day. She also testified that her head was swollen and that she still suffers from pains in her back (Tr. pp. 172-173).

The testimony of Dr. Osorio, the attending physician, is to the effect that this injury to her left knee is one which is exceedingly painful and that it is one which is not easily healed and in this case that although he thought that her knee might perhaps heal between the age of 20 and 25 years, that nevertheless it was his opinion that quite probably the wound would never entirely heal and that it was quite possible that plaintiff would be permanently afflicted by reason of the accident (Tr. p. 221).

Points and Authorities.

I. NEGLIGENCE OF PLAINTIFF IN ERROR.

The defendant (plaintiff in error) does not in its brief deny its negligence.

Furthermore, according to well settled rules, where the question of negligence is one of fact and not of law, the finding of the jury on the question is not open to review by this court on a writ of error.

Texas etc. Company v. Harvey, 228 U. S. 319.

This case was cited and following by this court in

Inter-Island Steam Navigation Co. v. Ward, 232 Fed. 809.

So too in *Herencia v. Guzman,* 219 U. S. 44, the court said, at p. 45:

> "The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to *negligence* and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered. *Express Company v. Ware,* 20 Wall. 543; *New York, Lake Erie & Western Railroad Company v. Winter's Administrator,* 143 U. S. 60, 75; *Lincoln v. Power,* 151 U. S. 436-438; *Humes v. United States,* 170 U. S. 210. Nor was any exception taken by the plaintiff in error to the instructions which the trial court gave to the jury. The only questions which are properly before us for review are as to certain rulings upon the admissibility of testimony."

It was the duty of defendant at all times to keep the opening in the street caused by the use of the elevator properly protected in order that the public, in using the sidewalk, should not be submitted to an unnecessary risk or hazard.

The pedestrian certainly has a right to assume that an opening in a public sidewalk or street, such as the one in the case at bar, is properly guarded. One who places an obstruction in a public sidewalk or street or makes a pitfall therein, causes a public

nuisance, and is liable for injuries resulting therefrom.

The substantive law applicable to cases of this kind is well stated in *Clifford v. Dam,* 81 N. Y. 52.

In the above case, the plaintiff brought an action to recover damages for injuries sustained from falling through a coal hole in the sidewalk in front of defendant's premises. The court said:

> "The public are entitled to an unobstructed passage upon the streets including the sidewalks on the side. * * * It was sufficient for the plaintiff to prove that in passing along the sidewalk he was injured by this structure which was appurtenant to defendant's premises. It was not necessary to prove negligence. The action was not based upon negligence but on a wrongful act for which the defendants were responsible * * *. It is quite clear that plaintiff was not bound to prove, in the first instance, anything except the existence of a hole in the sidewalk for which the defendants were responsible and that in passing along the sidewalk he fell into it."

II. THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

Defendant in its brief (pages 60-66) contends that the evidence shows, as a *matter of law,* that plaintiff was guilty of contributory negligence, and in the same connection complains of instructions given to the jury, which are set forth under Assignments of Error Nos. 15, 18 and 19, these instructions all bearing upon the question of the degree of care required of plaintiff.

The defendant argues that because plaintiff lived in the neighborhood and knew that the elevator was in the sidewalk, that she was reckless in not seeing the unguarded open trap-door leading to the elevator; and further argues that, because the open elevator trap-door was physically visible to any one passing along the sidewalk, plaintiff was negligent because she did not actually see the open trap-door before she fell in.

The undisputed evidence shows, however, that as the plaintiff was walking along the sidewalk and approaching the elevator opening, a boy on the opposite side of the street called to her and, child-like, her attention was attracted thereby, and, while her attention was thus distracted, she fell into the hole.

It is well settled as stated above under Point I (Brief p. 5) that unless this court can hold *as a matter of law* that plaintiff was guilty of contributory negligence, the weight or sufficiency of the evidence will not be considered, since all such questions are resolved by the verdict of the jury.

A case recently decided by this court so holds, and it is very similar in its facts to the case at bar.

Thus, in *Alaska Treadwell Gold Mining Co. v. Mugford,* (1921) 270 Fed. 753, the mining company had built a clubhouse with a platform on piles in front of it, which was used as a public passageway. A young lady who was on her

way to a dance in the clubhouse fell through a hole in the passageway due to a rotten and defective plank. The evidence showed that Miss Mugford knew that the platform was in a dilapidated condition but that she did not know of the hole. The court said, at page 756:

> "It is said that even though the platform was owned and maintained by the Mining Company and used as a thoroughfare, and that even if plaintiff below was rightfully there, she was guilty of *contributory negligence.* Miss Mugford testified that she knew generally that the platform *was in poor and dilapidated condition, but that she knew nothing of the hole,* and was not looking for one at the point where she stepped off the platform. It cannot be said that she was obliged to abandon the use of the walk merely because she knew in a general way that the street was generally in bad condition. Of course, she was obliged to use a care related to the dangers known to her, or of which she ought reasonably to have known; but she did not know of the *hole* at the point, and it could not be said she ought to have known of it. The court properly declined to say as a matter of law that she was culpable, and submitted the question to the jury. Bassett v. Fish, 75 N. Y. 303."

Other cases very closely parallel to the one at bar, both in its facts and the law applicable thereto, and where the question of contributory negligence on the part of a girl 19 years old was considered, are:

Barry v. Terkildsen, 72 Cal. 254;

McGuire v. Spence, 91 N. Y. 303.

In the case at bar plaintiff was only 13 years old and only such standard of care is required as is reasonably to be expected of a child of that age.

Long v. Ottumwa Ry. & Light Co., 142 N. W. 1008 (Ia.);

McEldon v. Drew, 116 N. W. 147 (Ia.);

29 Cyc., p. 642.

The case of *Kauffman v. Machin Shirt Company,* 167 Cal. 506, (cited by defendant in his brief at p. 62) holds nothing contrary to what is contended for by plaintiff. In that case a boy 15 years old was employed in a building where the elevator was operated personally by the different tenants of the building. The boy used the elevator to go to one of the other floors to deliver a package and on leaving the elevator left the door open. On returning in a minute or so to the elevator he stepped through the open gate which he had left open and fell down the elevator shaft, the elevator in the meantime having been moved away by someone else. The court held that he was guilty of contributory negligence, saying that if he was able to run the elevator it would be absurd to say that a lad of 15 years was ignorant of the necessity of exercising ordinary caution in entering the elevator.

We do not deem it necessary to present further argument upon this point. The jury having found a verdict for plaintiff under instructions which stated the law more favorably for defendant than it was entitled under the law in cases similar, it cannot

be successfully argued that plaintiff failed to establish a prima facie case.

The instructions given by the court on the subject of the degree of care required of plaintiff (Assignments of Error, Nos. 15, 18 and 19), were in full accord with the authorities cited above.

The case of *Garman v. City of Waverly,* 166 Ill. App. 399, (cited by defendant in its brief at page 66) holds that the instructions given by the court in that case, while technically correct as an abstract principle of law, are nevertheless erroneous because the uncontradicted evidence showed that plaintiff knew of the existence of the open stairway down which she fell, this stairway having been for 20 years in the public square and often frequented by plaintiff. Furthermore, in that case plaintiff was an adult 52 years old. To make this Illinois case at all similar to the case at bar, we would have to assume that this elevator door was always *open* and that the plaintiff knew that this elevator door was always open and was familiar with the continuously dangerous and unguarded condition of the sidewalk at this point. The evidence of course utterly fails to show that the elevator opening was ever left unguarded except on this single occasion or that plaintiff frequently saw the elevator used.

III. DAMAGES.

Plaintiff's injuries were admittedly the proximate result of defendant's negligence. There was no

conflict in the testimony as to the injuries suffered by plaintiff, but only as to the extent and permanency of some of them—injury to her left knee and to her back.

The evidence affirmatively shows not only the separation of the epiphysis of the left knee which the attending physician Dr. Osorio testified would probably never entirely heal and that plaintiff would quite possibly be permanently afflicted by reason of the accident, but also the other injuries in addition which are described in Plaintiff's Opening Statement herein.

Dr. Osorio, the attending physician, testified that in his opinion her knee would quite probably never entirely heal and that it was quite possible that the plaintiff would be permanently afflicted by reason of the accident (Tr. p. 221). Dr. Sexton, a physician called by defendant, testified on the other hand that in his opinion the injury would not be permanent. The whole question was thus one of the extent and permanency of the injury under the evidence and this question was of course left to the jury to decide.

In actions for personal injuries, the law does not attempt to fix any precise rule for the measure of damages, but leaves their assessment to the discretion of the jury. No method has yet been devised by which to measure and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be. Considering the injuries to

plaintiff, which were proven to have been suffered by her, it cannot be said that the jury were actuated by bias, prejudice or improper motives.

In *Alau v. Everett* (1887), 7 Haw. 82, the court said:

> "In actions for personal torts, the law does not attempt to fix any precise rule for the admeasurement of damages, but from the necessity of the case leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the Court, but it will never be disturbed unless the damage is so obviously disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury."

The same principle and rule as to the assessment of damages has been laid down by the Supreme Court of the United States. Thus, in

> *The Steamship City of Panama v. Phelps,*
> 101 U. S. 454 (1880),

the plaintiff fell down a concealed hatchway in the floor of the cabin near her stateroom which had been left uncovered by some of the employees of the steamship company. The Supreme Court of the Territory of Washington entered a decree in favor of the plaintiff in the sum of $15,000. The Supreme Court of the United States, in affirming the decree, said:

> "When the suit is brought by the party for personal injuries, *there cannot be any fixed*

> *measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution,* but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

This is also the rule laid down by the Circuit Court of Appeals of this Circuit (Ninth Circuit).

Western Union Telegraph Company v. Engler (1896), 75 Fed. 102;

Southern Pacific Company v. Raugh (1892), 49 Fed. 696.

The defendant in its brief (pp. 67-68) contends that the award of damages of $7250 was excessive.

It is well settled, however, that this court on a writ of error to a territorial court cannot consider this question. Thus, in

Phoenix Railroad Co. v. Landis (1913), 231 U. S. 578, the court said:

> "The argument in substance is that the verdict was without sufficient basis in the evidence. It cannot be said, however, that there was no evidence to go to the jury and as we are limited to those questions which may be properly raised on writ of error; an objection that the verdict is against the weight of evidence or that the damages allowed were excessive cannot be considered in this court" (Citing cases).

To the same effect are

St. Louis etc. Railroad Co. v. Craft (1915), 237 U. S. 648;

Herencia v. Guzman, 219 U. S. 44;
Wilson v. Everett (1890), 139 U. S. 616, 621;
Erie Railroad Co. v. Winter (1891), 143 U. S. 60, 75;
Lincoln v. Power (1893), 151 U. S. 436, 437.

The same rule has of course been announced by this court. Thus, in *Alaska Packers Association v. Gover* (1922), 278 Fed. 927, this court said, at page 929:

> "It is assigned as error that the court below overruled the defendant's motion to set aside the verdict and grant a new trial, and it is urged in the defendant's briefs that the amount of the verdict is grossly *excessive.* But it is so well settled as to require no citation of authorities that in a federal appellate court the ruling *of a trial court on a motion for a new trial is not assignable as error.* Nor can the question of the *amount of damages assessed* by a jury be re-examined in an appellate court. Phoenix Ry. Co. v. Landis, 231 U. S. 581, 34 Sup. Ct. 179, 58 L. Ed. 377; St. Louis & Iron M. T. Ry. Co. v. Craft, 237 U. S. 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224."

See also the *American Trading Company v. Steele* (1921), 274 Fed. 774,—also a decision of this court.

For completeness of argument, the following cases are cited, where substantial verdicts for personal injuries have been upheld, there being a more or

less close analogy of the facts in the cases cited with those of the case at bar:

Dolan v. Sierra Railway Co. (1902), 135 Cal. 435, (where a verdict of $7000 was upheld, where plaintiff was injured about the head, and there was evidence tending to show that his injuries were permanent);

Wheeler v. Chicago, etc. Railroad Co. (1913), 182 Ill. App. 194, (where a verdict of $15,000 for injuries resulting from the plaintiff's fractured kneecap, resulting in a stiffness of the joint, was upheld);

Galveston, etc. Railway Co. v. Stoy (1907), 99 S. W. 135 (Tex.), (where a verdict for $8000 for injuries to a railway switchman's knee, preventing him from performing the labor which he was employed to perform, and causing a shock to his nervous condition, was upheld);

Galveston, etc. Railway Co. v. Cade (1906), 93 S. W. 124 (Tex.), (where a verdict for $9300 on account of injuries to the knee of a locomotive fireman, causing a locked joint and a condition rendering him incapable of doing heavy labor, was upheld).

It should, furthermore, be expressly noticed that the cases cited above on the question of the excessiveness of the verdict, where substantial damages were allowed by the jury, were all decided prior to the year 1914, when the purchasing power of a dollar was very much greater than was the purchasing power of a dollar in the year 1921, when the verdict

in the case at bar was rendered. The courts have taken judicial cognizance of this fact as have also legal textbook writers.

Thus, in Volume 4 of *Sutherland on Damages,* 4th Ed., Section 1256, it is said:

> "The tendency in recent years has been for juries to award and courts to sustain increasingly larger sums as compensation for personal injuries. 'This is attributable, no doubt, to the greatly decreased purchasing power of a dollar, as exemplified in the rise of the price of nearly all commodities, and the enormous increase in the cost of living; and, in some measure, perhaps, to a higher regard for human life and the value of physical efficiency.' (Quoting from *Louisville & N. R. Co. v. Williams,* 183 Ala. 138)".

The lessened value of the dollar was adverted to in the following cases:

Hayes v. United Rys. Co., 183 Mo. App. 608 (decided in 1914);

Duffey v. Kansas City Railway Co. (1920), 217 S. W. 883 (Mo.),

(the court upheld a verdict for $5000 for injuries to a captain in the fire department of the city, in which his knee was injured, putting him to pain and impairing his agility).

Delhery v. Quinlan (1918), 210 Ill. App. 321;

Noyes v. Des Moines Club (1919), 170 N. W. 461 (Ia.), (sustaining a verdict for $8000).

Reply to Brief of Plaintiff in Error.

The first point advanced by plaintiff in error (defendant) is that the trial court erred in denying its motion for withdrawal of a juror.

This motion was occasioned by reason of the publication of a certain article in a local newspaper called "The Daily Post-Herald", the text of which is set forth in the transcript at pages 92 to 93, and which defendant claims was prejudicial to it.

Before discussing the merits of this objection of defendant to the denial of its motion to withdraw a juror, it should be noted at the outset that when the motion was made on May 25, 1921, it was based solely upon the affidavit of W. L. Stanley, the defendant's attorney, who was trying the case for defendant (Tr. pp. 48-52). This affidavit showed no more than the publication of the article and that James W. Russell was a stockholder of the publishing company; and Mr. Stanley stated his own conclusion that the article was prejudicial to defendant's rights.

A reply affidavit was filed by Mr. J. W. Russell (Tr. pp. 53-54) to the effect that he knew nothing whatever about the publication of the article before it was published and that he had nothing to do with the management or editorial policy of the paper, but only with its financial policy. A reply affidavit was also filed by Mr. Harold Russell (Tr. pp. 54-57), who was the reporter who wrote up the article, and who, though of the same name, was not related to

Mr. J. W. Russell. Mr. Harold Russell stated that all the information contained in the article had been gathered by him from two interviews with Mr. Meinke, the Hilo manager of defendant, and had been furnished him by said manager to be published in "The Daily Post-Herald" as a news article; he also stated that neither of plaintiff's attorneys knew in advance that the article was to be published.

Counter-affidavits were filed by both Mr. Stanley and by Mr. Meinke; Mr. Stanley (Tr. pp. 57-60) making denials of some of the allegations contained in the newspaper articles, and Mr. Meinke (Tr. pp. 60-63) giving his version of his interviews with Mr. Russell, the reporter.

This was the only record before the trial court when the motion to withdraw a juror was made and denied. The trial court (Judge Thompson) after holding that a motion to withdraw a juror did not lie under the practice of the Territory of Hawaii, went on and found the facts to be as stated by plaintiff in the reply affidavits of Mr. J. W. Russell and of Mr. Harold Russell, the reporter, and against the affidavits of Mr. Stanley and Mr. Meinke on behalf of defendant (Tr. pp. 64-66). Subsequently, on defendant's motion for a new trial (Tr. pp. 70 et seq.) defendant asked for a new trial, amongst other grounds, upon the ground of newly discovered evidence bearing upon the publication of the same newspaper article; certain affidavits containing this additional evidence were attached to, and made a part of, defendant's motion for a new trial

(Tr. pp. 74-83). In one of the supplemental affidavits of E. A. Namohala (Tr. p. 81), one of the jurors who tried the case, Mr. Namohala stated that on the afternoon of May 24, 1921, the first day of the trial, he saw and read the article in question. No affidavits from any of the other jurors were furnished, and it is fair to presume, therefore, that none of the other jurors saw or read the article. There were also other counter-affidavits relating to the circumstances under which the article was published, but it is not material to this part of our discussion to consider them here.

The trial Judge (Judge Ross), who passed upon defendant's motion for a new trial, denied the motion and in doing so, said:

> "I am unable to say that the published article was of such a nature, or contained statements which were of a prejudicial character, and gave effect or weight to any evidence and that the jury was in any manner influenced by the said article, even though one of the jurors read it. Particular stress by the defendant is placed on that portion of the article which states that an *insurance* company is defending the case for the defendant, and that the insurance company at the time of the accident agreed to settle for a small amount of damages. Newspapers should be very careful as to what they publish during a trial, and in my opinion the above statements should not have been published while the trial was going on, yet if the law permitted a new trial for everything a newspaper might publish, that is everything and anything that a party might conceive to be prejudicial, the courts would be busy granting new trials, or a statute would have to be en-

> acted prohibiting the press from making any comment whatever on proceedings in court. I cannot see where the article as published is so prejudicial as to justify, require or permit the withdrawal of a juror under the motion, or now, on that ground to grant a new trial" (Tr. p. 94).

In other words, neither the affidavit of Mr. Nomahala, the juror, who said he saw and read the article, nor any of the other supplemental affidavits used on the motion for a new trial, were before Judge Thompson, who tried the case, when in the course of the trial he denied defendant's motion to withdraw a juror.

Assuming for the time being that the ruling on the motion by Judge Thompson in the course of the trial may be reviewed in this court, it is respectfully submitted that the ruling of Judge Ross, denying a new trial on any of the grounds upon which the motion of defendant for a new trial was based, cannot be reviewed in this court on writ of error.

Thus, this court in *Alaska Packers Association v. Gover,* 278 Fed. 927, said, at page 929:

> "It is assigned as error that the court below overruled the defendant's motion to set aside the verdict and grant a new trial, and it is urged in the defendant's briefs that the amount of the verdict is grossly *excessive.* But it is so well settled as to require no citation of authorities that in a federal appellate court the *ruling of a trial court on a motion for a new trial is not assignable as error.* Nor can the question of the amount of damages assessed by a jury

be re-examined in an appellate court. Phoenix Ry. Co. v. Landis, 231 U. S. 581, 34 Sup. Ct. 179, 58 L. Ed. 377; St. Louis & Iron M. T. Ry. Co. v. Craft, 237 U. S. 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224."

In *Erie Railroad Co. v. Winter,* 183 U. S. 60, at page 75, the court said:

> "Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for *a new trial, the granting or refusal of which is not assignable for error here.* As stated by us in *Aetna Life Ins. Co. v. Ward:* 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. *In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge.* We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.' 140 U. S. 91, citing numerous cases."

In *Lincoln v. Power,* 151 U. S. 436, at p. 439, the court said:

> "If, then, no errors were committed by the court below in the admission or exclusion of evidence or in its charge to the jury, the verdict and judgment must be permitted to stand. Such errors are, however, assigned and will now receive our attention."

Since, therefore, the denial by the trial court of defendant's motion for a new trial may not be reviewed in this court, it is only the ruling of the trial court (Judge Thompson) in the course of the trial which may be here reviewed, and the ruling must of course be reviewed on the same record which was before Judge Thompson.

This record, as we have seen, did not show or purport to show that this newspaper article was seen or read by any juror in the case.

Defendant, however, has asked that the court's order denying a new trial be held erroneous because defendant's motion to withdraw a juror was denied. Defendant in its brief (p. 67) says:

> "The motion of defendant in error for a new trial should have been granted upon all of the grounds urged," etc.

On defendant's assumption that the court's ruling on the motion for a new trial may be reviewed it has assumed that the juror's affidavit to the effect that he had seen and read the article was part of the record for consideration by this court. Following this assumption, defendant has cited two groups of cases; first (pp. 17-26) cases dealing with the improper offer of evidence or improper statements in court in the presence of the jury; and second (pp. 27-37) cases where prejudicial articles in newspapers have actually been read by the jury in the course

of the trial. Thus defendant, in its brief at page 35, says:

> "A motion for the withdrawal of a juror and entry of a mistrial is a proper motion when inadmissible evidence has been placed before the jury."

So much for the record in the case and defendant's misconceived theory that this court may review the ruling of the lower court denying defendant's motion for a new trial.

Coming now to the merits of defendant's objection, in the first place, it is very doubtful whether such a motion—a motion to withdraw a juror—lies under the practice of the Territory of Hawaii, or for that matter, in any of the States or Territories within the Ninth Circuit of the United States.

Counsel for defendant, in the trial court, admitted that during their practice in the Territory of Hawaii they had never known of a motion of this character having been presented to a court, and that the question had never been presented to the Supreme Court of the Territory of Hawaii (Tr. p. 91). The trial judge (Judge Thompson), in passing on the motion at the trial, held that no such motion lay under the local practice in the Territory of Hawaii (Tr. pp. 64-65).

The Supreme Court of the Territory of Hawaii did not pass upon the question in the case at bar as to whether or not such a motion lay under the

practice of the Territory, but upheld the ruling of the trial court on other grounds (Tr. p. 360).

In *Usborne v. Stevenson* (1892), 58 Pac. 1103 (Ore.); s. c. 48 L. R. A. 432, Judge Bean, speaking for the Supreme Court of Oregon, held that the motion did not lie under the practice of Oregon. The practice in Oregon in this respect is similar to that in all the Pacific Coast States.

In the case-note in 48 L. R. A. 432, there is a full review of the cases dealing with this motion.

Defendant in its brief (p. 36) cites four cases in support of the practice of allowing such motion, but two of these are New York cases, where the practice seems to have originated, and the two Federal cases cited are by the Circuit Court of Appeals of the Third Circuit, dealing with the practice in the State of Pennsylvania.

Inasmuch as the Code States of the Ninth Circuit have full and adequate statutes relating to continuance of a trial in case of surprise, and a party can at any stage of the trial ask for re-examination of any particular juror, or of all of the jurors, if occasion arises requiring such a course to be pursued, it seems very doubtful whether such a motion —to withdraw a juror—lies under the practice in the Territory of Hawaii or elsewhere in the Ninth Circuit. At any rate, the industry of counsel for defendant has been unable to cite any case from the Territory of Hawaii, or any case decided by the Circuit Court of Appeals of the Ninth Circuit where such a motion was ever employed or allowed.

And it would seem doubtful if this court will give its sanction to this practice which, as Judge Bean says, was based on a fiction, because of the old theory laid down in some of the ancient cases that this was the only method by which the rights of a party might be protected in case of surprise. The liberal procedure and practice in modern times, and specially in the Code States, makes the reason of the rule disappear, hence the rule itself fails of its foundation. Just as long established practice makes the law of practice of a jurisdiction, so the entire absence of a practice contended for after the lapse of a long period of years in any jurisdiction, likewise tends to negative the existence of the rule of practice contended for.

If defendant thought that it was prejudice by the newspaper article in question, it should, as suggested by the Supreme Court of Hawaii (Tr. p. 357), have appealed to the trial court for leave to examine any particular juror, or all of the jurors, as on the voir dire. If this same article had been published the day before the jury was impanelled, the mere previous reading of this article would not have disqualified these same men from acting as jurors in the case. If they had answered, either that they had not read the article, or that having read it, they could disregard the statements therein contained and weigh the evidence impartially, they would have successfully passed any challenge which either counsel could have made upon that ground. But counsel for defendant evidently did not wish to try out the ques-

tion on the merits as to whether any of the jurors had seen the article, or whether, having seen it, any of them were prejudiced thereby. No, defendant makes a technical objection, based on an abstract theory that the jury had seen the article and were prejudiced and asks that a mistrial be ordered. Why did not defendant, as suggested by the Supreme Court of Hawaii (Tr. pp. 358-359), ask to have the jurors re-examined so as to determine whether or not they had read the article, or what effect, if any, it had upon them. Had they been examined and the trial judge had been satisfied that they could weigh the evidence impartially, this motion would have been denied as a matter of course.

In *Marrin v. United States,* 167 U. S. 951 (Circuit Court of Appeals, Third Circuit), the court held:

> "While the fact that jurors engaged in the trial of a criminal case have read newspaper articles relating to the case which were highly improper and calculated to prejudice the defendant, will justify the Court in its discretion in permitting the withdrawal of a juror and the continuance of the case, *it is not an abuse of discretion to refuse to do so, where such jurors upon being interrogated admit that the articles read would not influence them in arriving at the verdict.*"

So, too, in *Hollenbach v. McCord,* 132 S. W. (~~Kansas~~ Mo.) 1189, the court held:

> "In an action for injuries * * * a newspaper published an account of the proceedings, whereupon defendant moved to discharge the jury because of such publication. Held that

> such publication did not constitute ground for discharging the jury or the granting of a new trial *in the absence of proof that the jury as sworn were unduly influenced by the publication to defendant's prejudice.*"

So, too, in *State v. Hoffman,* 45 So. (La.) 951, the court held:

> "Though the jury have been allowed to separate the publication of comments upon the case by a local newspaper during the trial will not be ground for discharging the jury in the absence of proof *that the jurors or some of them actually read the comments and were so impressed thereby as to be disqualified from further service on the jury.*"

Suppose the court had granted the motion of defendant and ordered a new jury impanelled for the next day, upon which the article in question was published. Would defendant have been any better off with respect to the jury than if defendant had been afforded the opportunity of re-examining the same jury which was already in the jury box?

Should defendant be allowed to make a mere technical motion to withdraw a juror, irrespective of a showing of actual prejudice, and that one or more of the jurors read the article, with the possible hope and expectation that his motion will be denied and thus take his chances with the jury as to a favorable verdict and urge his technical point on appeal as a ground of reversal? The Supreme Court of the Territory of Hawaii, in sustaining the judgment in the case at bar, said that it was incum-

bent upon defendant, in conformity with correct and well recognized procedure, to have asked:

> "at the opening of the second day's session of the court that the trial be suspended and the jurors re-examined in order to ascertain how many, if any, of them had read the article in question, how many, if any, had received from the article impressions as to the merits of the case on trial and how many, if any, were not able to sit with unprejudiced minds in the further trial of the case" (Tr. p. 35).

The Supreme Court also said that:

> "it would not *do to permit a party to take the chance of a favorable verdict and failing in that to claim the existence of prejudice of jurors which he failed to show when he had the opportunity*" (Tr. p. 359).

We thus find that defendant made a motion which probably does not lie under the practice of the Territory of Hawaii or of the Ninth Circuit, and we find him employing a motion based on an abstract assumption of fact that the jurors or some of them did in fact read the article, and that they were in fact prejudiced against defendant by reason thereof; whereas, defendant had the opportunity of having one or more of the jurors examined to determine whether as an actual fact any of the jurors had read the article and if so, what effect, if any, the article had on their minds.

However, assuming for the sake of argument that defendant was within his legal rights to make the

motion to withdraw a juror, was error committed by the trial court in denying the motion?

The trial court found that Karl J. Meinke, the resident manager of defendant, had given the reporter the information which was set out in the article and found that if any injury was done it was brought about by defendant's own acts. The court further found that in its belief the right of no one was prejudiced or jeopardized by the article in question (Tr. p. 66).

While it is true that Mr. J. W. Russell, the president of the Daily Post-Herald, was a partner of Mr. Patterson who tried the case at bar for the plaintiff, Mr. J. W. Russell made an affidavit that he was concerned only with the financial policy of the paper and not at all with the administrative affairs of the company, and that he had no knowledge whatsoever, prior to the publication of the article, that anything would be published about the case. The denial of defendant's motion implies that the trial court found in accordance with Mr. Russell's affidavit. The trial judge was Judge Thompson. The motion for a new trial was heard and decided by Judge Ross, who held that the article was not so prejudicial as to justify the granting of a new trial (Tr. p. 94).

Furthermore, to grant a motion to withdraw a juror is a matter resting in the sound discretion of the trial court. *It is not a right and has been said*

by many courts to be a favor. All the authorities agree that it is a matter resting in the sound discretion of the trial court.

The following authorities support the above statement of the law that the granting or refusing of the motion lies in the discretion of the court:

Glendening v. Canary, 5 Daly (N. Y.) 489, 48 L. R. A. 432;

Bradley v. D. E. Cleary Co., 86 N. J. L. 338, 90 Atl. 1015;

Cattano v. Metropolitan Street Railroad Co., 173 N. Y. 365, 572, 66 N. E. 563, 565;

Cheesebrough v. Conover, 140 N. Y. 382, 388, 35 N. E. 633, 635;

Heiler v. Goodman's Motor Expressvan & Storage Co., 105 Atl. 233, (N. J.) 191.

Furthermore, it is submitted that on writ of error this court will not review the ruling on defendant's motion, since the motion deals with the question of local practice in the courts of the Territory of Hawaii.

Thus, in *Tevis v. Ryan* (1913), 233 U. S. 273, on writ of error to the Supreme Court of the Territory of Arizona, the court said:

> "We are not disposed to lightly disturb the decision of the Territorial Supreme Court, turning so largely, as it does, upon the local practice."

In *Sanford v. Ainsa,* (1912) 228 U. S. 705, the court said:

> "We rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance."
>
> *Herbert v. Bicknell* (1914), 233 U. S. 70;
>
> *Kalamianaole v. Smithies,* (1913) 226 U. S. 462.

A large number of cases are cited by defendant in its brief for the proposition that evidence is inadmissible to the effect that defendant is insured against (defendant's brief, pp. 17-18); or that an offer of compromise has been made (defendant's brief, pp. 20-26).

Each and all of these cases cited by defendant are cases where the evidence was offered or admitted, or statements made, in court before a jury. In the cases cited, the jury actually heard the evidence or the statements; they were made by counsel in the ordinary course of the trial. And these cases being applicable only to cases where improper evidence was actually brought to the attention of the jury in the court-room during the progress of the trial, they have little or no relevancy upon the question at issue in the case at bar, and no useful purpose would be served by a separate and detailed consideration of each individual case cited. As said by the Supreme Court of the Territory of Hawaii (Tr. pp. 359-360):

> "There is a difference worthy of mention between evidence, offers of evidence and argument

> adduced in court, on the one hand, and newspaper publications out of court, on the other hand. The latter, it may well be presumed, would not have the same effect upon a jury as the former. Hollenbach v. McCord, 132 S. W. (Mo.) 1189, 1190, 1191. Nor was there any evidence in the case at bar tending to show that the plaintiff or her attorneys or anyone else in her behalf caused the publication in question to be made. The only evidence on the subject is to the effect that the plaintiff's attorney did not cause the publication and the trial judge so found as a fact."

The cases cited by defendant represent the extreme view of the courts of some of the states. The courts of many other states, however, hold that even where improper evidence is offered or improper remarks made by counsel or others in the presence of a jury, the remarks of the judge to the jury that they should disregard the improper evidence or statements cures the objection taken by opposing counsel.

For example, in *Bradley v. D. E. Cleary Co.* (1914), 90 Atl. 1015 (N. J.), the court held:

> "Under the conditions existing at the trial of this case the trial judge properly refused to order a mistrial upon the alleged ground that defendant's rights had been prejudiced before the jury in that plaintiff had illegally injected into the evidence, as if it had been proved, *the fact that defendant had been insured against loss through accident;* the granting of such order under the circumstances rested in his discretion and his refusal was not assignable error."

In *Holt v. Oval Oak Mfg. Co.* (1919), 98 S. E. (N. C.) 369, the court held:

> "In action for injuries to an employee where employer's counsel made improper allusions to insurance company indemnifying the employer, the court by immediately cautioning the jury as to the only issues, removed the prejudice that such allusions were calculated to produce."

In *Williamson v. Hardy* (1920), 47 Cal. App. 377, 190 Pac. 646, the court held:

> "On its appeal from the judgment in favor of the plaintiff in an action for damages for personal injuries, the record did not support the contention of appellant that counsel were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of appellant against claims for damages, the only time counsel for plaintiff referred to that fact the court having instructed the jury to disregard the remarks of counsel for plaintiff in that respect."

See also to the same effect the following cases:

Muehlebach v. Muehlebach Brewing Company (1922), 242 S. W. 174 (Mo.);

Stafford v. Noble (1919), 182 Pac. 650 (Kansas);

St. Louis etc. Co. v. Nowland (1919), 215 S. W. 11;

Coral etc. Company v. Collins (1918), 205 S. W. (Ky.) 958;

U. S. v. Reid, 12 How. 361; s. c. 13 Law Ed. 1023.

The Supreme Court of Hawaii, in passing upon this question in the case at bar, said:

> "It is true that in many cases in New York, Illinois and perhaps other states it has been held that the mere statement, direct or indirect, by counsel to or in the presence of the jury that the defendant is protected by accident insurance is reversible error. This is an extreme view and does not appeal to us as sound. We do not care to follow it. We think that with a possible occasional exception due to particular circumstances ordinary cautionary instructions would cure what otherwise might be error. There are other cases, of course, which hold that cautionary instructions do cure. See for example, Holt v. Manufacturing Co., 98 S. E. (N. C.) 369, 370, 371."

THE INSTRUCTION AS TO DAMAGES.

Another point argued by plaintiff in error is that the trial court erred in giving the instruction as to damages because the court added the words "but in no event in a sum in excess of the amount of $11,500".

On pages 68 to 71 of its brief, defendant claims that there was error in the instruction of the court (Assignment of Error No. 20) on the subject matter of damages because the court ended its instruction with the words "but in no event in a sum in excess of the amount of $11,500" (Tr. p. 384).

Defendant in its brief (p. 68) states that the court mentioned in its instruction "the amount claimed by the defendant in error" in her complaint. A refer-

ence to the instruction discloses, however, that no reference was made by the court that the sum of $11,500 "was claimed by plaintiff in her complaint". We do not believe that it would have been erroneous if the court had added after the instruction as given a statement that said sum was the amount claimed by plaintiff in her complaint. The fact is, however, the court did not refer to the $11,500 as being the amount claimed by plaintiff in her complaint.

The case of *Vaughan v. McGee,* 218 Fed. 630 (decided by the Circuit Court of Appeals of the Third Circuit), which is cited by counsel for defendant on p. 69 of its brief, held that under the Pennsylvania practice a reference by counsel for plaintiff to the amount of damages claimed by plaintiff in his complaint was error. Even if this extreme rule were good law generally it would have no application to the case at bar for neither the court nor counsel made any reference to the amount of damages claimed by plaintiff in her complaint.

In 1 *Randall "Instructions to Juries",* Sec. 351, it is said:

> "While there are decisions that it is not good practice to mention the ad damnum in the instructions, the general rule is that an instruction referring to the amount sued for, or limiting the right of recovery to the amount claimed in the declaration, is not error, unless the instruction is so worded as to suggest giving the amount so claimed." (Citing cases from many jurisdictions to the effect that reference to the ad damnum clause of the complaint is not error.)

In California and many other states, and in the Ninth Circuit of this court, instructions have been upheld which contained a reference to the damages claimed by the plaintiff in his complaint.

Swensen v. Bender, 114 Fed. 1, (decided by the Circuit Court of Appeals for the Ninth Circuit.);

Learned v. Transit Company, 193 Pac. (Cal.) 591;

Ryan v. Oakland, etc. Co., 21 Cal. App. 14;

Denver, etc. Co. v. Owens, 36 Pac. (Colo.) 848;

Sherwood v. Chicago, etc. Railway Co., 46 N. W. (Mich.) 773;

Chicago, etc. Railway Co. v. Penix, 159 Pac. (Okl.) 1141;

Mackay v. Commission, 152 Pac. (Ore.) 250;

Gulf, etc. Railway Co. v. Brown, 40 S. W. (Tex.) 608;

Picino v. Utah-Apex Mining Co., 173 Pac. (Utah) 900;

City of Charlottesville v. Jones, 97 S. E. (Va.) 316.

Instructions similar to the one in the case at bar, where the court used the words "not exceeding $.....'' have been upheld in the following cases:

Reitz v. Hodgkins, 112 N. E. (Ind.) 386;

Chesapeake, etc. Co. v. Bland, 188 S. W. (Ky.) 498;

City of Charlottesville v. Jones, 97 S. E. (Va.) 316;

City v. Bradbury, 25 Pac. (Kan.) 889;
Sherwood v. Chicago, etc. Railway Co., 46 N. W. (Mich.) 773;
Bamber v. United Railways Co., 192 S. W. (Mo.) 953;
Rogan v. Montana, etc. Railway Co., 52 Pac. (Mont.) 206;
Bower v. Chicago etc. Company, 148 N. W. (Neb.) 145;
Chicago, etc. Railway Co. v. Penix, 159 Pac. (Okl.) 1141.

THE RULING AS TO MEDICAL TREATISES.

Another point argued by plaintiff in error (defendant) is that the court erred in refusing to order Doctor Osorio, a witness for the plaintiff, to produce certain medical books for examination by defendant's counsel (defendant's brief, pp. 51-60) (Assignments of Error Nos. 6, 12 and 13).

Assignment of Error No. 6 is based on the transactions occurring at the trial, as set forth in the Transcript at pp. 248-9; also at pp. 265-6.

Assignment of Error No. 12 is based upon the transactions occurring at the trial, as set forth in the Transcript at pp. 284-5.

Assignment of Error No. 13 is but a repetition of the points covered by Assignments Nos. 6 and 12.

Assignment of Error No. 4, although casually referred to in defendant's brief at p. 51, is not relied upon by defendant, since defendant in its brief

(p. 51) expressly enumerates the errors relied upon and does not mention Error No. 4, and in fact defendant does not seriously rely on this error as shown by defendant's brief at p. 51.

Assignments Nos. 6, and 12 are discussed together by defendant and they will likewise be considered by plaintiff as they raise substantially the same point.

It can readily be ascertained from the transcript that plaintiff's counsel did not elicit from Dr. Osorio the citation of a single medical authority upon his direct examination. This is of course conceded by defendant.

Many cases hold that where a medical expert in his direct examination does not refer to medical books, it is improper for opposing counsel to refer to medical books at all in connection with the witness' examination.

Allen v. Boston Elevated Ry. Co., 98 N. E. (Mass.) 618.

Where the expert in his direct examination has expressly named a medical authority, on cross examination, opposing counsel may call to the witness' attention statements in the treatises mentioned, in order to qualify or impeach the witness' statements as to the contents of said treatises.

Union Pacific Railroad Company v. Yates, 79 Fed. 584 (Circuit Court of Appeals Eighth Circuit);

Eggart v. State, 25 So. (Fla.) 144-147;

Gallagher v. Market Street Railway Company 67 Cal. 13, 17.

Dr. Osorio did not even volunteer the name of any medical authority on his cross examination. The names of the treatises mentioned in the cross examination were each and all solicited by defendant's attorney in answer to defendant's attorney's questions whether the doctor could cite any authority to substantiate his opinion.

It will be ascertained from the transcript that defendant's counsel did not call to Dr. Osorio's attention any particular statement contained in any of the medical authorities mentioned, but merely asked the doctor in the case of Keene's book "will you see if you can find anything"—in support of his opinion, (Tr. p. 284); and defendant's counsel asked the court to require the witness to produce the other medical books mentioned by the doctor in order "to have him read the extracts from these books", etc. (Tr. p. 249).

The most liberal rule which is announced in the cases is that where a medical expert has expressed his opinion without referring in his direct examination to any such treatises, on cross examination opposing counsel may *read to the witness,* or *call to the attention of the witness,* certain statements in the treatises bearing on the question at issue which are *not in harmony with the witness' testimony,* for the purpose of impeaching the witness or testing the expert's knowledge.

Victoria American, etc. Co. v. Tomljanovich, 232 Fed. 662 (Circuit Court of Appeals Eighth Circuit);

Ganz v. Metropolitan Railroad Co., 220 S. W. (Mo.) 490;

Griffith v. Los Angeles Pacific Railroad Company, 14 Cal. App. 145.

In the California case last cited, the physician had expressed his opinion that plaintiff had sustained an injury which was of a permanent character. Upon cross examination, he was asked whether he had read any books on the subject, to which he replied that he had read "Dana". Opposing counsel then asked the witness "Doesn't Dana state * * that paralysis of spinal origin must exist on both sides?" The witness had already expressed his opinion to the effect that paralysis of spinal origin did not exist on one side only. The trial court sustained the objection. On appeal, the appellate court, while holding that the trial court committed a technical error in sustaining the objection to the question, held that the ruling was without prejudicial error because counsel's question did not seek to elicit anything different from that to which the witness had testified. The court in discussing the principle said:

> "The rule affecting the examination of an expert medical witness, which permits a showing of the contents of the books of standard authors skilled in that particular profession, is limited. It is permissible only to show what such authors have declared upon a subject, when a witness has based his opinion wholly or in part upon his reading of books of that character (*Fisher v. Southern Pacific R. Co.,* 89 Cal. 400, (26 Pac. 894); *Lilley v. Parkinson,* 91 Cal. 655, (27 Pac.

> 1091)), and then only when statements found in such books *are not in harmony with the testimony of the witness. Here the physician expressly declared that he had neither heard nor read of a case where there was spinal injury with resulting paralysis of one side of the body only.*"

It should be noted that in the California case above named defendant's counsel did not, as did counsel in the case at bar, ask the witness to hunt through Dana and see if he could find a statement *supporting* the witness' testimony.

Counsel for defendant has not cited, and we submit, cannot produce, any authority permitting the course of examination undertaken by defendant's counsel at the trial in attempting to compel the witness to search through medical books for statements *in support* of his testimony.

The contrary to this proposition is announced in *Bell v. Milwaukee, etc. Railway Co.,* 172 N. W. (Wis.) 791, where opposing counsel attempted, on cross-examination, to introduce excerpts from scientific treatises in evidence, where such excerpts did not tend in any way to contradict or impeach the witness' testimony. Opposing counsel asked the witness, who was a doctor, on cross-examination "if he considered Oppenheim an authority on optic atrophy". Upon the witness answering that he had read a number of Oppenheim's works, counsel

undertook to read certain extracts from the book and then asked the witness the following question:

> "Having your attention called to that passage from Oppenheim * * * do you recall ever having read that before?"

The Supreme Court held that

> "under repeated decisions of (our) court its admission was erroneous."

So, too, in *Marshall v. Brown,* 15 N. W. (Mich.) 755, the court, speaking through Judge Cooley, said:

> "On the cross-examination of Dr. Wood, a witness for the defendant, he was asked if he was acquainted with a certain book. He replied that he had heard of it but had not read it. He was then asked whether it was considered good authority, and he said it was. He was then *requested to read a certain paragraph during the recess of the court.* When the court convened again, he was recalled and counsel reading from the book the paragraph to which his attention had been called, asked him whether there was a case reported of taking sulphate of zinc, followed by vomiting, purging, and death? As this was what the paragraph stated, the evident purpose of the question was to put the passage from the book in this indirect manner before the jury instead of reading from it directly. The witness demurred to this method of examination, but was required to answer and did so. The case differs from *Finney v. Cotrell,* 48 Mich. 584, (S. C. 12 N. W. Rep. 862), where a medical book was produced to *contradict* a witness who professed to be testifying from it."

So, too, in *City of Bloomington v. Shrock,* 110 Ill. 219, a doctor was called as a witness in a negligence

case for plaintiff and in his direct examination made no reference to any book. On cross examination defendant's counsel asked him whether he was acquainted with certain medical treatises, naming them, and upon his responding in the affirmative and to the effect that they were standard authorities, counsel proceeded to read at length from these treatises and then inquired of the witness *whether he agreed with the authorities as to the parts so read.* The trial court overruled an objection to this evidence on the part of plaintiff's counsel and on appeal the Supreme Court of Illinois reversed the judgment on account of the error of the trial court in permitting this line of examination. The court said, at pp. 222-223:

> "Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinon as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. *But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.*"

The authorities cited by defendant in its brief (pp. 53-54) are all authorities which support plain-

tiff's contentions and do not at all support defendant.

Thus in the citation from *Wigmore, "On Evidence",* on p. 53 of the brief, it is said:

> "Where a witness has been allowed to refer to a treatise as corroborating him, the treatise may be read to show that it does not contain such corroboration on the principle of *discrediting* the witness by showing misstatements on a material point."

In *Pinney v. Cahill,* 12 N. W. (Mich.) 862 (cited at p. 54 of defendant's brief), the court says that medical treatises may be referred to "not to prove the facts it contained but to disprove the statement of the witness", etc.

So, too, in *Clark v. Commonwealth,* 63 S. W. 740 (cited by defendant on p. 54 of the brief), it appears that on cross examination the medical witness referred to a medical work by Dr. Dodd. Opposing counsel then offered to show from Dr. Dodd's treatise that the statement in said treatise was different from the statement of the witness in order to *discredit* the expert in connection with his cross examination. The court very properly held that the evidence was admissible for this purpose.

Furthermore, there is nothing to show what statements were contained in "Keene", or, for that matter, in any of the other books cited, and so this court is unable to see whether defendant was prejudiced or not, assuming purely for the sake of argument

that the court should have permitted the line of examination undertaken by defendant's counsel.

Thus, in *People v. Goldenson,* 76 Cal. 328, the court said, at p. 349:

> "If the portions which were excluded had any tendency to discredit or contradict the witness upon any matter about which he had testified, they ought to have been incorporated into the Bill of Exceptions, so that we might determine whether they were pertinent. They are not in the Bill."

The opinion of the Supreme Court of the Territory of Hawaii in the case at bar on this point (Tr. pp. 362-363) is, we submit, a full and correct exposition of the law on the subject.

Counsel for defendant complains of the denial by the court of his request that Dr. Osorio be compelled to produce "some of the books" named by defendant's counsel from the doctor's office in the courtroom for use by defendant's counsel in having the doctor "read the extracts from these books, or refer to the extracts from the books" (Tr. p. 249).

The court was thus correct in refusing to have the witness produce the books for the purposes stated, since they would, if produced, have been used for the purpose stated.

But assuming that the request had been made to have the books produced for the purpose of being consulted by counsel for defendant in order to afford counsel the opportunity of seeing if they contained any statements *at variance* with the state-

ments of Dr. Osorio, in order that Dr. Osorio might be further examined, was it error for the court to deny the motion to compel the witness to bring his books into court?

At common law no person was bound to furnish his adversary with evidence to be used against him.

The right to the inspection of books and papers with a view to discovery of evidence is not to be confused with the production of them on examination of a party as a witness before trial. The party examined before trial may be requested by subpoena duces tecum to produce books and papers and they will be used upon the examination in the same way as if produced on his examination as a witness at the trial.

It is submitted that the refusal of the court to compel the witness to produce the books was a matter resting in its discretion, and could not be assigned as error. The record shows that the books were standard authorities which all doctors have in their possession, and there is no showing that defendant did not have access to them.

In *Commonwealth v. Lannan,* 13 Allen (Mass.) 563,

the following appears: at the trial, which was in Essex County, a witness for the commonwealth, having testified on cross examination that he looked at a memorandum made by him of the facts as to which he testified, before leaving Boston on the morning of the trial for the purpose of refreshing

his memory, and that the memorandum was in Boston at the time of his testifying, defendant's counsel requested the court to require the witness to produce the memorandum. The court said:

> "Requesting the witness to produce a memorandum which is not in court and which he has not been summoned to produce is a matter within the discretion of the court and a refusal to require it is no cause of exception."

Counsel for defendant was given every opportunity to examine the books which he requested the witness for plaintiff to produce, and if the statements made by the witness were not correct the ordinary course of procedure would have been to offer the books in evidence if they contradicted any statement made by the witness.

Furthermore, plaintiff's attorney consented that defendant's counsel might recall the witness if he wanted to ask him any questions based on these authorities (Tr. p. 249).

It is to be presumed as a fair inference of fact that Dr. Sexton, defendant's medical expert who testified at the trial, or other doctors in the town, had these same works at their disposal and that defendant's counsel had access to all of these books. Defendant made no showing that he had no access to these works save through the copies possessed by Dr. Osorio.

THE RULINGS SUSTAINING CERTAIN OBJECTIONS TO QUESTIONS ASKED ON CROSS-EXAMINATION.

And finally, plaintiff in error (defendant) contends that defendant's counsel was unduly restricted in the scope of his cross-examination of Dr. Osorio. This point is covered by Specifications of Error Nos. 7, 8, 9, 10 and 11. Taking them up in order:

Specification of Error No. 7, the proceedings relating to this Specification of Error are set out in the transcript at p. 268. Dr. Osorio, in answer to several questions previously directed to the same point, testified in substance that he considered it proper treatment after the plaintiff had had three weeks rest in bed to put a bandage on her knee and let her walk around her house, and that such treatment would not retard recovery but would help it (Tr. pp. 264-5). Defendant's counsel almost "nagged" the witness on this point and finally the trial court, without any suggestion of plaintiff's counsel and in the exercise of a proper discretion, required defendant's counsel to proceed to his next point. As the court said "this has been answered three or four times" (Tr. p. 268).

Specification of Error No. 8 (Tr. p. 260) goes to the same point as Specification of Error No. 7. Defendant's counsel came back to the same line of examination already fully covered and the court sustained objections to a repetition of these questions,—all the same in substance.

Specification of Error No. 9 (Tr. p. 269) goes to the same point as Specifications Nos. 7 and 8.

Specification of Error No. 10 (Tr. p. 272) also goes to the same point. The doctor had previously answered several times the substance of this question, and the court on its own motion, considering that the point had been fully covered by the doctor's previous answers, required defendant's counsel to discontinue this line of examination.

Specification of Error No. 11 (Tr. p. 279). There was nothing harmful in this motion of the court. Defendant in its brief (p. 37) does no more than mention this specification of error and does so without comment or argument in support of this error.

We respectfully submit that the judgment should be affirmed.

Dated, May 26, 1923.

FRED PATTERSON,
CHARLES S. DAVIS,
MORRISON, DUNNE & BROBECK,
EDWARD HOHFELD,
Attorneys for Defendant in Error.